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In the Matter of

THOMAS E. BRANDT,

Complainant

vs.

UNITED PARCEL SERVICE,

Respondent

DATE ISSUED: JUNE 29, 1995

Case No. 95-STA-26

Thomas E. Brandt
17 Rancho Villa
Walla Walla, WA 99003

Pro se

Norma Schwab
Employment and Employee
Relations Manager
United Parcel Service
6707 North Basin Avenue
Portland, OR 97217

For respondent

Before: Thomas Schneider
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
(Denying Complaint)

This case arises under the "whistleblower" protection of §405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 USCA §31105 (1995), and the regulations at 29 CFR Part 1978. A hearing was held in Portland, Oregon on May 10, 1995. Complainant, Thomas E. Brandt (Brandt), appeared *pro se* and respondent, United Parcel Service (UPS), appeared by its Employment and Employee Relations Manager. Evidence was received. Brandt's argument was stated in a notebook which contained his summary of, and commentary on articles which were also contained in said notebook. Respondent was given an opportunity to respond, which it did in a letter dated June 9, 1995. The record closed on June 26, 1995 after the time for further briefs had expired. TR 95.¹

Facts

The facts are not in dispute, except as noted.

¹ TR refers to pages of the transcript of hearing. CX refers to complainant's exhibit.

There is no dispute that UPS is engaged in interstate trucking operations and that its employees operate commercial motor vehicles in interstate commerce, and that this complaint under STAA is properly before me. See, Secretary's Findings, dated March 28, 1995.

Brandt was hired by UPS as a "feeder driver" on or about October 31, 1994. UPS hires additional drivers at this time every year on a temporary basis to help with increased workload before Christmas. TR 26. He was given forty hours of training, which ended at approximately 2:00 P.M. on Friday, November 4. TR 36. He was advised that he might be called to drive a variable shift (TR 45), and that the majority of the runs are at night. TR 27, 48, 77.

Debbie Blankenship, one of UPS's Feeder Supervisors at the Hermiston terminal, testified that she called claimant on Friday, November 4th and left a message on Brandt's answering machine. TR 34. Brandt testified that he never got this message. TR 11. This is the only conflict in evidence, but it need not be resolved because it is agreed that Brandt did get a message on Saturday, November 5th at approximately 7 P.M. that he would be needed to drive from Hermiston, Oregon to Spokane, Washington and return, beginning at 8:00 P.M. on Sunday, November 6. TR 12. Brandt therefore had more than 24 hours notice of his proposed assignment.

Brandt calculated that the proposed assignment would have ended at 6:00 A.M. on Monday, November 7, requiring a shift in his sleeping pattern. TR 14. He refused the assignment during his conversation with Debbie Blankenship on the ground that he would be too fatigued to drive safely, as a result of having to change his sleeping pattern. TR 13, 38, 62. He repeated the refusal in person at UPS's Hermiston facility two hours later (TR 39), and again at a meeting with UPS personnel on the morning of Monday, November 7. TR 47. UPS thereupon terminated his employment. Ray Warren, UPS's Feeder Supervisor in Hermiston, stated that he needed drivers he could count on to work when called.

Law and contentions

In order to establish a prima facie case for relief under STAA an employee must show that he engaged in protected conduct, that he was subject to adverse employment action, and that his employer was aware of the protected conduct when it took the adverse action, and must present evidence sufficient to raise the inference that the protected conduct was the likely reason for the adverse action. *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y.Feb. 16, 1989) DOL Decs.² Vol. 3, No. 1, p. 162, 168; *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

It is undisputed that Brandt was terminated, which is an adverse employment action, and that the reason for termination was Brandt's refusal to take the proposed assignment. The focus of the dispute is, therefore, whether Brandt's refusal was protected activity.

49 USCA § 31105 (1995) provides in pertinent part:

(a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of

² DOL Decs. refers to the publication of the United States Department of Labor entitled "Decisions of the Office of Administrative Law Judges and Office of Administrative Appeals." Secretary of Labor Decisions are also available on a CD ROM published by the Office of Administrative Law Judges, entitled "Whistleblower Library" for sale by the U.S. Government Printing Office, Superintendent of Documents.

employment, because--

(A) ...

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or ...

Brandt contends that he was justified in refusing the assignment because, had he accepted it, he would have been in violation of a regulation related to motor vehicle safety, viz., 49 CFR §392.3 which provides:

§ 392.3 Ill or fatigued operator.

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle. However, in a case of grave emergency where the hazard to occupants of the vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the motor vehicle to the nearest place at which that hazard is removed.

Brandt admits that taking the assignment would not have violated the hours of service rules specified in Part 395 of 49 CFR. TR 16. These rules spell out in detail the maximum hours a driver may drive in various periods. Brandt rests his contention on the general assertion that safety laws should be liberally construed, and on a number of scientific studies which he summarized in a letter to Russell C. Hart, the OSHA investigator, copies of which were also introduced into the record before me. CX 1.

Brandt is, of course, correct that the STAA should be interpreted liberally. For example, the Secretary has stated:

Section 405(b) ³ must be interpreted consistent with Congressional intent, namely, the promotion of commercial motor vehicle safety on the nation's highways. ...

Given the clear legislative concern for promoting commercial motor vehicle safety, I agree with the ALJ that Section 405(b) should not be read so narrowly that it would protect an employee who refused an order to violate motor vehicle safety regulations only if the violation exists at the time the order is given.

Boone v. TFE, Inc., 90-STA-7, (Sec'y. July 17, 1991) DOL Decs. Vol. 5, No. 4, p. 160, 161, aff'd *sub nom. Trans Fleet Enterprise, Inc. v. Boone*, 987 F.2d 1000 (4th Cir. 1992).

The articles relied upon by Brandt are in three groups. The first consists of

³ Section 405(b), 49 USCA App. §2305(b)(1993) was the predecessor of the statute involved here, 49 USCA § 31105 (1995).

documentation that fatigue in the workplace and in the trucking industry is more significant than commonly realized; that the cost of accidents in which fatigue is involved is large, both in dollars and in lives. This group includes two technical reports of the National Transportation Safety Board. The second group consists of an explanation of circadian rhythm-- the rhythm, set by a person's biological clock, that controls sleep patterns according to day and night, and perhaps according to bright light and darkness, or other factors. The point is that to change one's patterns of sleep takes several days for many, or most, people, who become sleepy or fatigued before adjusting to a new rhythm, which makes it unsafe to drive. The third group consists of data on studies showing that sleepiness in the work environment can be measured and predicted. The point is that the driver is the best judge of his own sleepiness, and that there is a high correlation between subjective feelings of sleepiness and some objective physiologic changes.

UPS contends that these articles, insofar as they refer to the trucking industry, refer to long haul drivers that are paid by the mile or by the load. UPS drivers are paid by the hour (TR 56), and are guaranteed ten hours off between shifts by the labor contract. "Mr. Brandt was terminated for his inability to fulfill the requirements of the job."

Discussion

Robinson v. Duff Truck Line, Inc., 86-STA-3 (Sec'y. March 6, 1987) DOL Decs. Vol. 1, No. 2, p. 451, aff'd sub nom. *Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (6th Cir. 1988) (Table) involved a driver who refused an assignment to drive under conditions he deemed unsafe because of ice on the road. The Secretary wrote:

I reject the position that section 392.14⁴ is violated whenever the driver has a reasonable and good faith belief that it is unsafe to drive. Section 392.14 makes no mention of a driver's good faith belief. Rather, this section by its clear terms prohibits the operation of a vehicle when the weather conditions are in fact such that the vehicle cannot be operated safely.

Id., at p. 454. The Secretary went on to hold that the weather conditions were in fact dangerous and found that Mr. Robinson had engaged in protected activity.

Although fatigue is inherently more subjective than weather conditions, the Secretary's position implies that § 392.3, in the context of an STAA whistleblower proceeding, should not be interpreted to justify a driver's purely subjective feeling of fatigue. Some objective factor must validate the subjective feeling.

In one case a driver pulled over for a nap, feeling severely fatigued after having been up for 19½ hours, driving the last seven. The Secretary ruled, and the court affirmed, that Yellow Freight Systems violated STAA when it disciplined the driver for taking a nap under those circumstances. *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993). In another, *Smith v. Yellow Freight System, Inc.*, 91-STA-45 (Sec'y. March 10, 1993) DOL Decs. Vol. 7, No.

⁴ **§ 392.14 Hazardous conditions; extreme caution.**

Extreme caution in the operation of a motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the vehicle shall be discontinued and shall not be resumed until the vehicle can be safely operated. ...

2, p. 46, the Secretary ruled in favor of the driver under STAA because he was disciplined for taking a fatigue break. He had been ready for dispatch for ten hours, then was dispatched two hours later for a ten hour run. After driving for about an hour he pulled over in order to nap.

These cases are the typical cases involving the fatigue provision of §392.3, with or without a violation of the hours of service rules specified in Part 395. Of course, many cases have found a driver protected for refusing to violate the hours of service rules. E.g., *Boone v. TFE, Inc.*, *supra*, 90-STA-7, (Sec'y. July 17, 1991) DOL Decs. Vol. 5, No. 4, p. 160, 161, *aff'd sub nom. Trans Fleet Enterprise, Inc. v. Boone*, 987 F.2d 1000, 1004 (4th Cir. 1992), *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y. August 31, 1992) DOL Decs. Vol 6, No. 4, p. 203

Brandt's reliance on the journal articles is an attempt to show that the driver's appraisal of his own alertness should be given more weight than the hours of service rules. This assertion requires some analysis of the relationship between the two rules. The hours of service rules are designed to set a workable criterion that enables both drivers and their employers to estimate in most circumstances how much driving is feasible and safe within a certain time. The illness and fatigue regulation seems designed for those situations where the hours of service rules are inadequate to insure safety. **I conclude that the hours of service rules establish a presumption of safe operation that can be rebutted by evidence showing circumstances peculiar to a particular situation.**

Sometimes a driver will be fatigued even if he has time left under the hours of service rules. For example, where he suddenly requires medication to fight an infection and drowsiness is a side effect. See *Palazzolo v. PST Vans, Inc.*, 92-STA-23 (Sec'y. March 30, 1993) DOL Decs. Vol. 7, No. 2, p. 42. Such a very particularized circumstance cannot be taken into account by the hours of service rules. Like weather conditions, it is objectively verifiable.

Complainant has shown very little concerning his individual circumstances. He believed that disrupting his sleep pattern (which he testified was from 10 P.M. to 6 A.M. [TR 19]) even with more than 24 hours notice, would cause him to become fatigued during the night when he was expected to drive. He testified to a prior experience that he thought was similar to the assignment he was requested to take, where he got very tired. TR 65-68. Although this is Brandt's particular experience, it is not objectively verifiable. Ray Warren, another supervisor and former feeder driver, testified that some drivers are able to adjust their sleeping times by going to bed later and then napping before going on duty, or having other individual techniques. TR 54. Steven L. Sepich, UPS's safety manager, testified to the same effect. TR 79-80. I therefore find that Brandt has not shown that his refusal to take the driving assignment was protected activity.

Assuming, however, that from Brandt's point of view his refusal to drive was protected activity, from UPS's point of view its firing him was a valid business decision. It needed flexible drivers. If Brandt could not change his sleeping pattern, which may have been true, he was not suitable for the job. This is an additional reason that requires a finding that Brandt was not fired for engaging in protected activity, but rather for a valid business reason.

If it is true in general that disrupting a driver's sleep pattern is likely to result in dangerous driving, the hours of service rules should reflect this general truth. In fact, Brandt writes in his letter of March 19, 1995 to the OSHA investigator, "The Federal Government must now take all this information and create a realistic rule regarding duty hours based on the circadian rhythm research." Brandt's argument and the data supporting it should be addressed to the Department of Transportation, the agency that writes the general rules. I found the

argument and the data very interesting, but insufficient to overcome the presumption that the hours of service rules now in force state the general guidelines applicable to commercial drivers at this time.

Accordingly, I find that respondent's action of firing complainant was not discriminatory. I recommend that the Secretary enter the following order pursuant to 29 CFR §1978.109(c)(4):

ORDER

The complaint of Thomas E. Brandt is denied.